

The Administrative Law Judge (ALJ) determined claimant suffered a 60 percent functional impairment. The ALJ further determined claimant retained the ability to earn a comparable wage and consequently limited claimant's award to her functional impairment. The award was further limited to \$50,000 pursuant to K.S.A. 44-510f(a)(4).

The claimant requests review and argues that she is permanently and totally disabled. She also argues that she is entitled to additional dates of temporary total disability compensation and that the ALJ did not address the issue of her outstanding medical expenses. Lastly, claimant argues K.S.A. 44-510f(a)(4) is unconstitutional as applied.<sup>1</sup>

The respondent and its insurance carrier request review and argue that claimant failed to meet her burden of proof that she suffered accidental injury arising out of and in the course of her employment. In the alternative, if the claim is found compensable, they argue the ALJ's determination that claimant is limited to her functional impairment should be affirmed but the claimant's functional impairment should be based upon an average of Drs. Prostic and Hendler's ratings which would result in a 37 percent functional impairment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On December 8, 2000, the claimant suffered a fall while at work for respondent. Claimant said the accident occurred when a box she was standing on while reaching for some containers slipped out from under her. The claimant fell to the floor striking her entire left side as well as hitting her head on a box. Claimant noted that afterwards she was extremely sore and slightly bruised as well as numb on her left side.

A co-worker heard the claimant fall. The co-worker turned around, saw claimant on the floor and offered to help her get up. Claimant declined the offer noting she just needed to catch her breath. Claimant did not work any more that day and clocked out.

When claimant returned to work the following day, she remained extremely stiff and sore on her left side and because she was unable to raise her left arm she could not perform her job duties as a cook. Claimant then advised respondent's owner of the accident and she also advised her daughter who was her immediate supervisor. It was claimant's uncontradicted testimony that her daughter contacted respondent's insurance carrier to obtain workers compensation benefits for claimant.

The following Monday after her accident, the claimant called her personal physician, Dr. C. M. Tenniswood and requested a refill for her arthritis prescription. Claimant admitted she did not again request respondent to provide her medical treatment. Because her condition continued to worsen as she attempted to work, the claimant called the doctor and

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<sup>1</sup> The claimant acknowledged that the Board cannot decide the constitutionality of statutes but raised the issue in order to preserve it for later appeal.

scheduled an appointment for December 15, 2000. When claimant saw Dr. Tenniswood she was given a shot of cortisone and a prescription for Prednisone. Claimant thought she told Dr. Tenniswood about the fall at work. Claimant attempted to continue to work the week after the accident but noted that her foot was dragging and she couldn't reach up with her left hand. Claimant said that respondent's owner, Kelly Allgret, was aware of her condition.

Claimant's last day worked was December 17, 2000, and when claimant kept her doctor's appointment on December 19, 2000, she was referred to the emergency room at Olathe Medical Center. Her symptoms included the inability to raise her left hand, her left foot was dragging and she was unable to hold anything in her left hand. Dr. Michael E. Ryan examined the claimant at that time and noted that her symptoms were not suggestive of a herniation at C4-5 but instead the doctors were testing claimant for a possible cerebrovascular condition. Claimant was released from the hospital on December 21, 2000.

As her symptoms continued to worsen the claimant returned to the Olathe Medical Center emergency room but was not admitted for treatment. Because her condition continued to deteriorate claimant then went to the emergency room at the Shawnee Mission Hospital where she was admitted for treatment. An MRI of the cervical spine revealed a large left-sided protrusion at C4-5 with spinal cord compression and myelopathy.

On December 27, 2000, Dr. Charles M. Striebinger performed an anterior cervical discectomy and fusion with cervical plating at C4-5. The doctor noted that the main treatment was to undertake surgical decompression of the spinal cord and that required removal of the C4-5 disk and fusion of that space in order to provide room for the spinal cord. The claimant was then referred St. Luke's South Hospital for rehabilitation.

### **Whether claimant suffered a work-related accidental injury?**

Respondent argues claimant failed to establish she suffered a work-related accident and relies upon the medical records from Dr. Ryan's treatment of claimant which indicated a fall on Thanksgiving before the alleged December 8, 2000, work-related fall. Dr. Striebinger's history also included reference to the fall on Thanksgiving as well as the December 8, 2000, fall at work. Respondent argues claimant's medical condition was the result of the Thanksgiving fall instead of any alleged fall at work.

Initially, it should be noted that claimant's uncontradicted testimony was that she fell at work. Although the fall was unwitnessed, the claimant identified a co-worker who heard the fall and then saw claimant on the floor and offered to help her get up. This testimony was not rebutted. Furthermore, claimant told respondent's owner as well as her supervisor about the accident the day after it occurred.

Respondent argues that claimant's failure to mention the fall when she initially sought treatment indicates that the incident did not occur. The Board disagrees. When claimant first sought treatment from her physician she simply requested a refill of her arthritis medication because she thought that had been aggravated by her fall at work. As her symptoms progressively worsened claimant then went to see her doctor a week after the fall at work. And claimant's testimony was that she thought she told the doctor about her fall at work.

Claimant admitted that she fell on Thanksgiving but denied that she needed or received any medical treatment after that incident. When asked why she provided information about that fall she replied that at the emergency room she was trying to come up with any incidents, such as car wrecks or falls, that would help the doctors determine what was wrong. And when she returned to the emergency room at Shawnee Mission Hospital seeking treatment she did tell Dr. Striebinger about the fall at work.

The Board concludes claimant's mention of a previous fall when she sought emergency medical attention does not rebut her testimony, especially when she did mention the fall at work when she later gave her history of injury to Dr. Striebinger. Furthermore, claimant's uncontradicted testimony was that she never received any medical treatment after the Thanksgiving fall and was able to work without any difficulty until the December 8, 2000, fall at work.

Even assuming claimant was injured in a fall on Thanksgiving, the doctors agreed that the fall at work on December 8, 2000, would have aggravated any preexisting condition. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>2</sup> The ALJ's conclusion claimant suffered a work-related accident is affirmed.

### **Nature and extent of disability**

After her fall at work the claimant experienced gradual loss of use of her left arm and leg. As the condition worsened more rapidly the claimant was required to seek emergency room treatment. Initial testing was focused upon a possible cerebrovascular incident. That condition was ruled out and claimant was released from the hospital but as her condition continued a rapid deterioration she returned to the emergency room on two occasions. Claimant was developing progressive quadriparesis which is weakness of the bilateral arms and legs. When it was finally determined claimant had suffered a large herniated disk at the C4-5 level causing spinal cord compression, surgery was immediately performed to decompress the spinal cord and fuse the cervical spine.

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<sup>2</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

Claimant continues to complain of neck pain and has spasticity with little use of her left arm and leg. She uses a brace on her left leg and is required to use a cane to walk. And she has a markedly abnormal gait dragging her left foot. Claimant also developed bladder incontinence as well as tremors and shakes on her right side.

Dr. Charles M. Striebinger, a board certified neurological surgeon, first examined claimant on December 27, 2000, and, after reviewing an MRI performed that day which revealed a large herniated disk at the C4-5 level causing spinal cord compression, performed a surgical decompression of the spinal cord. Dr. Striebinger removed the C4-5 disk and then fused the inner space.

Dr. Striebinger opined the claimant's left upper extremity and various other problems are due to the spinal cord being damaged prior to having the spinal cord decompressed. He further testified the claimant's altered gait is also due to the cord injury. Lastly, the doctor opined the claimant's bladder problems are due to the damage that was done to the spinal cord. If the central portion of the spinal cord is injured, the bladder doesn't function properly. This is called a neurogenic bladder.

Dr. Striebinger further noted that as a result of her injuries claimant has aggravated a preexisting degenerative disk at L5-S1. The doctor testified:

Q. Okay. Now, would you have an opinion whether or not the residual medical condition from her work-related injury has in any way aggravated, accelerated, or intensified that low back condition?

A. The low back problem that she's had is due to a degenerative disc at the L5-S1 level, the bottom disc. And sitting aggravates this in her particular case and the more sitting she does the more this becomes painful. And with her injury she has been doing more sitting than what she ordinarily did prior to the spinal cord injury.

Q. So would it be your opinion that this sitting activity aggravates that underlying condition or makes it more symptomatic?

A. Right. It does. It didn't cause the problem obviously.<sup>3</sup>

Finally, the doctor opined claimant could perform a sedentary or dispatcher type job but only after her lumbar problem has been treated.

Dr. Michael E. Ryan examined claimant when she went to the emergency room for the first time. At respondent's request, he later examined the claimant on October 24, 2001. At the time of the second examination the doctor's report noted:

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<sup>3</sup> Striebinger Depo. at 7-8.

The patient does have significant neurologic impairment and would not be able to return to work at this point in time. She is not able to stand or walk for any length of time. She is not able to lift objects of any significant weight and is not able to do repetitive tasks. She has significant incoordination of her extremities, especially her left upper extremity making it difficult for her [sic] perform even simple office tasks at this point in time.<sup>4</sup>

The doctor also noted that claimant's bladder incontinence was related to her spinal cord injury. He concluded that if claimant's physical condition had not improved from the time of his last examination then she would not be able to return to work.

The claimant was referred by her attorney to Dr. Edward J. Prostin for examination on March 14, 2001, and re-examination on June 17, 2002. Dr. Prostin opined that claimant's problems were caused by the December 8, 2000, work-related accident. The doctor concluded claimant suffered cervical myelopathy which he explained was an injury to the spinal cord that renders loss of control to the muscles of her left arm and leg. He noted it also rendered claimant with loss of continence. Dr. Prostin also concluded that claimant's pre-existing spondylolisthesis at L5-S1 had become symptomatic due to her antalgic gait.

Upon re-examination of the claimant on June 17, 2002, Dr. Prostin noted claimant continued to have severe loss of function of her left arm and leg, neurogenic bladder and substantial mobility problems. The doctor opined that claimant continued to essentially be totally disabled from gainful employment. Lastly, Dr. Prostin rated claimant's permanent partial functional impairment at 80 percent pursuant to the *AMA Guides*.<sup>5</sup>

The claimant was referred by respondent to Dr. Steven L. Hendler for examination on April 19, 2002. Initially, Dr. Hendler agreed that claimant's fall on December 8, 2000, aggravated, accelerated and intensified her underlying preexisting conditions which he described as degenerative changes in the cervical spine as well as rheumatoid arthritis. Dr. Hendler diagnosed the claimant with cervical myelopathy, disk herniation, status post-discectomy with internal fixation of fusion, degenerative joint disease, rheumatoid arthritis and alcoholism. Dr. Hendler placed restrictions on the claimant that she is unable to consistently lift or carry, unable to perform repetitive work with the upper extremities, unable to perform fine motor activities with the left hand, restricted from continuous sitting and recommended occasional standing and walking.

Dr. Hendler rated claimant at 10 percent for her gait disturbance; 19 percent for her upper extremity impairment; 9 percent for bladder urgency and 9 percent for a surgically treated cervical disk. The doctor combined these for a 40 percent permanent partial

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<sup>4</sup> Ryan Depo., Ex. 2 at 5.

<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

functional whole body impairment. The doctor further opined that he would apportion one third to the work-related accident and two thirds to her preexisting conditions and concluded claimant had suffered a 14 percent permanent partial functional whole body impairment. But the doctor agreed that alcohol did not have any relationship to claimant's current problems and that claimant was functioning in a normal capacity before the fall on December 8, 2000.

Lastly, Dr. Hendler opined the claimant would be able to do a telephone solicitor position only if the keyboard entry could be done with one hand on an occasional basis. He further opined that the security monitoring service clerk as well as the telephone answering service operator would also depend on the keyboarding requirement.

Michael Dreiling, a vocational consultant, interviewed claimant at her attorney's request. Mr. Dreiling prepared a task list of the job tasks claimant had performed in her 15-year work history before her accident on December 8, 2000. Mr. Dreiling opined that claimant does not have the ability to engage in any type of substantial and gainful employment. Mr. Dreiling noted that claimant's loss of use of her left lower extremity would affect her ability to be mobile and get to and from work. He further noted that even sedentary work requires good use of both upper extremities which claimant no longer possesses. Lastly, he concluded claimant's incontinence would impact claimant's ability to work and sustain work activities.

Karen Terrill, a vocational rehabilitation consultant, conducted a telephone interview with claimant at respondent's request. Ms. Terrill prepared a task list of the job tasks claimant had performed in her 15-year work history before the accident on December 8, 2000. Ms. Terrill concluded claimant retained the ability to be a telephone solicitor, security monitoring service clerk, telephone answering service operator and a fingernail technician. Ms. Terrill concluded claimant retained the ability to earn \$7 to \$10 an hour.

The claimant notes that she is on Social Security disability and as a result of her work-related injury she has suffered a permanent total disability. The Board agrees.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.<sup>6</sup>

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."<sup>7</sup> The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the

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<sup>6</sup> K.S.A. 44-510c(a)(2).

<sup>7</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity.<sup>8</sup>

The "existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine."<sup>9</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>10</sup>

The claimant has limited use of her left hand and leg. She must use a cane to walk and wears a brace on her left leg. She walks with a severe spastic antalgic gait. Her preexisting degenerative disk disease of her lumbar spine has become symptomatic as a result of her injury according to Drs. Prostic and Striebinger. Lastly, claimant has become incontinent.

Dr. Prostic testified that claimant was essentially unable to engage in any substantial gainful employment. Dr. Striebinger testified that until claimant received treatment for her symptomatic lumbar spine she was unable to engage in substantial gainful employment. Dr. Ryan concluded that unless claimant's condition had improved from his last examination, claimant would be unable to engage in substantial gainful employment. It should be noted that claimant's condition has not improved and arguably has worsened with increased right side complaints. Lastly, Mr. Dreiling concluded claimant did not retain the ability to engage in substantial gainful employment.

The Board is not unmindful of the opinions of Dr. Hendler and Karen Terrill that claimant can perform sedentary work, however, the Board finds the opinions of Drs. Striebinger, Prostic and Ryan as well as Mr. Dreiling's more persuasive. The Board concludes claimant has met her burden of proof to establish she is permanently and totally disabled as a result of her December 8, 2000, work-related accident. Consequently, the ALJ's Award is modified to reflect claimant is entitled to an award of permanent total disability.

Claimant has further established she was temporarily totally disabled from her admission to Shawnee Mission Medical Center on December 24, 2000, through March 1, 2001.

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<sup>8</sup> Id. at 112.

<sup>9</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

<sup>10</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

It was undisputed that claimant provided notice of her accident to the respondent. It was further undisputed that her supervisor was attempting to obtain medical benefits for the claimant from the insurance carrier. Before that issue was resolved the claimant's condition began a rapid progressive deterioration which required her to receive emergency room treatment and surgery to correct the disk compressing the spinal cord. Under these circumstances it was appropriate for claimant to seek treatment and respondent is liable for payment for the medical treatment claimant received.

The Workers Compensation Act requires the employer to provide such medical services that may be reasonably necessary to cure and relieve an injured employee from the effects of an injury. The Act provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, **as may be reasonably necessary to cure and relieve the employee from the effects of the injury.**<sup>11</sup> (Emphasis added.)

But if the employer refuses or neglects to provide medical treatment, the employee may obtain medical treatment and the employer is liable for that expense. The Act reads:

. . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. . . .<sup>12</sup>

As indicated above, the Board concludes that respondent neglected to provide claimant with medical treatment despite its knowledge that claimant had suffered a work-related injury and was seeking treatment. Although the Board agrees that ordinarily the claimant should have requested specific medical treatment, nonetheless, the rapid progression of her condition required that she proceed to surgery without requesting specific authorization from respondent. Therefore, the respondent is responsible for paying the medical expenses for the December 27, 2000, surgery and any follow-up care.

The ALJ's application of the statutory cap in K.S.A. 44-510f(a)(4) is rendered moot by the Board's determination claimant is permanently and totally disabled. The Board

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<sup>11</sup> K.S.A. 44-510h(a).

<sup>12</sup> K.S.A. 44-510j(h).

notes claimant has challenged the constitutionality of the cap on award for functional impairment. Claimant wishes to preserve the issue, acknowledging the Board does not have the authority to declare an act of the legislature to be unconstitutional.

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 5, 2003, is modified to an award of permanent total disability.

The claimant is entitled to 90.71 weeks temporary total disability compensation at the rate of \$172.25 per week or \$15,624.80 followed by permanent total compensation at \$172.25 per week not to exceed \$125,000 for a permanent total general bodily disability.

As of September 19, 2003, there would be due and owing to the claimant 90.71 weeks temporary total compensation at \$172.25 per week in the sum of \$15,624.80 plus 53.43 weeks permanent total compensation at \$172.25 per week in the sum of \$9,375.57 for a total due and owing of \$25,000.37 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance of \$99,999.63 shall be paid at \$172.25 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director